

# “Play it once, Sam. For old times’ sake”

## Legal fragmentation in the context of the Rohingya proceedings before the ICJ and ICC

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Rachel Behring

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The [parallelism of different international proceedings](#) examining atrocity crimes committed against the Rohingya in Myanmar has been [welcomed](#) by many [commentators](#). Indeed, international law (IL) appears to be showing its strength, pursuing individual as well as state responsibility for the repelling wrongdoings committed against the Muslim group of Rakhine State. Nonetheless, the International Court of Justice (ICJ) and the International Criminal Court (ICC) simultaneously dealing with legal questions embedded in a sole factual context – incidentally, for the very first time – might equally reawake some long-forgotten scholarly fear: the potential for international law’s [fragmentation](#).

### Same old, same old: the fragmentation of international law

The ominous term, among the most controversial ones IL has developed in recent times, once provoked a fierce scholarly discussion that [peaked](#) some years ago. Concerned with the supposedly increasing inconsistency in the application of IL, the absence of a binding *stare decisis* rule and an overarching ‘international court of appeal’ alike was believed to increase the [risk for contradicting judgments](#) at the international level.

Regarding the case of the Rohingya, it is *prima facie* understandable that the [‘postmodern anxieties’](#) famously associated with fragmentation might return. Not only are two international courts evaluating the same set of facts. Moreover, similarities with the constellation of trials that brought about the probably most frequently cited example of the phenomenon are coincidental, but striking: in its 2007 decision in *Bosnian Genocide* (at [§§399-407](#)), the ICJ *expressis verbis* contradicted the International Criminal Tribunal for the Former Yugoslavia (ICTY), hence cementing a textbook example of legal fragmentation. Background to the famous dissent on attribution of actions of non-state actors to States was thus the only other time the ICJ was called to pronounce a judgement based on the [Genocide Convention](#). Antagonist had again been an international criminal court.

### The scope of current proceedings before ICJ and ICC

In this context, this blogpost aims to shed some light on the question whether another big moment of fragmentation can be suspected to emerge from the awaited judgements. Undoubtedly, the most obvious risk for a such disintegration would emerge if ICJ and ICC were to charge the same crime. [Genocide](#), however, is

being tried before the former, while the ICC's Office of the Prosecutor (OTP) is currently investigating into crimes against humanity (CAHs), namely [deportation, persecution and "other inhumane acts"](#). The cogwheels of state and individual criminal responsibility appear to be rotating without however meshing. While this somewhat highlights the [incompleteness](#) and limits of current efforts, one might wonder whether it does not equally advert the danger of fragmentation, rendering useless any discussion on the topic.

Indeed, the ICJ's jurisdiction in the matter is restricted to violations of the [1948 Genocide Convention](#) (GC). Should the case eventually crumble, [as not few scholars fear](#) in the face of the difficulties expected in proving the required genocidal intent, The Gambia, as plaintiff, could not simply choose to 'downsize' to CAHs. Surely, the '[Draft Convention on the Prevention and Punishment of CAHs](#)' asserts in article 2 that "*every state has the obligation not to engage in acts that constitute crimes against humanity*". [Without a such Convention](#), the affirmation of the *erga omnes* nature of therein-enshrined state obligations as well as a corresponding compromissory clause, however, The Gambia is effectively hampered from seeking state responsibility for CAHs before the ICJ.

The possibility for the ICC to assert jurisdiction over this alleged genocide, in turn, recently captured renewed attention: long-[dismissed](#) due to Myanmar not being a State Party to the Rome Statute (RS), the Pre-Trial Chambers' (PTCs) decisions on the Court's jurisdiction over the deportation of Rohingya to Bangladesh might have turned things around. The latter established the Court's jurisdiction to cover crimes of which '*part of the criminal conduct*' (at [§61](#)) occurred on the territory of a State Party. While [arguably dismissing](#) the distinction between conduct and consequences [clearly anchored within RS and the ICC's Elements of Crimes alike](#), the PTCs categorized the Rohingya arriving in Bangladesh to be part of a such criminal conduct. However controversial this step has been: the conflation of these different elements might equally allow the Court to assert jurisdiction over certain forms of genocide.

### **Genocide against the Rohingya before the ICC?**

Applying the PTC's albeit flawed logic, Myanmar officials might be tried before the ICC for having '*deliberately inflicted conditions of life calculated to bring about physical destruction*' (article 6(c) RS) of the Rohingya. [Heller](#) argues that forcing the group to live under life-threatening conditions in refugee camps in Bangladesh while prohibiting return can be argued to constitute this deliberate infliction of eventually mortal conditions of life. *Van Schaack* equally hints, albeit more prudently, that deportations could be counted among the forms of violence that may be used to bring about the so-called '*slow death*' ([Van Schaack, p. 293](#)). She points out that the ICJ found that ethnic cleansing can be indicative of an '*intent to destroy*' in *Bosnian genocide* (at [§190](#)) while nonetheless clarifying that the latter is not identical to an '*intent to displace*'.

The potential that a charge of genocide on this basis could have is not to be underestimated, even more so against the backdrop of the reports about how deportations of Rohingyas were carried out. Building upon *Van Schaack's* thoughts,

it needs to be underlined that the Myanmar military continued to [murder people at border crossings](#), shooting them or deliberately placing [anti-personnel landmines](#) along the refugee routes and at the border. Deportation therefore can be argued to not only have been employed to persecute or expel, but to ensure extinction of the targeted group.

### **The risks of parallel charges of genocide**

Several routes therefore still seem open to charge genocide in the Rohingya matter before the ICC, a court which has been good for surprises in the past. Were the OTP to go after Burmese perpetrators for the '[crime of crimes](#)', a race against the clock would start for ICJ and ICC alike. The paradox behind the issue of fragmentation in the context of the prosecution of international crimes would become evident. After all, the complementarity between the pursuit of individual and state responsibility has been the entire gist of the persecution of international crimes since the end of World War II. It stands symbolically for the ideal that neither the abstract entity of the State nor the individual perpetrator are to escape accountability for their wrongs. For the case of genocide in particular, the ICJ recognized a certain '[duality of responsibilities](#)' (*Croatia v. Serbia*, at §129). But again, implementing this idea in practice will require substantive cooperation and consideration from all judicial organs involved.

That is to say, in the Rohingya matter, both courts involved will need to be careful not to restrict each other's freedom of movement – despite this being barely feasible. The court ruling later than the other [would be forced](#) to assess the other's authority on the matter in question, concurring or departing from its decision, thus provoking a potentially severe breach. As impossible as to predict whether genocide will actually be charged in parallel before ICJ and ICC, appears to foresee which proceeding would then outpace the other. Remarkable, however, has so far been that the preliminary examination (PE) of the Myanmar/Bangladesh matter was completed by the OTP in a ridiculous [ten months](#). Indeed, it has been the fastest PE in the last ten years, with this stage of proceedings on average taking some five years ([see Reports on Preliminary Examination Activities](#)).

While this does not necessarily suggest that the ICC will continue at this pace, [some commentators](#) might see it as proof of a resolute determination amongst the ranks of OTP staff to make the most of the Rohingya proceedings. At the very least, it reinforces the suspicion that the 'less-experienced' ICC might be the court more inclined to rush ahead, increasing the likelihood of legal fragmentation.

### **Lessons of the past: fragmentation and cooperation in *Bosnian Genocide***

That being said, it seems worthwhile to take a glance at the other time the ICJ had to take an international criminal tribunal's finding on genocide into account. Possibly surprising for some, this might comfort some of the above concerns. Indeed, the overt dispute on the '*effective*' and '*overall control-test*' aside, cooperation between ICJ and ICTY in regard to the Bosnian genocide functioned rather smoothly.

Surely, the ICTY's Trial Chamber had long found genocide to have been committed in Srebrenica in [Kristić](#) and [Blagojević and Jokić](#), thus limiting the ICJ's range of

maneuver. As is well known, however, the latter came to the same conclusion. Importantly and less reflected upon in the literature on fragmentation, it moreover adopted an approach that would later be called an '[over-reliance on the ICTY](#)' by some commentators. For once, the Court drew heavily upon the factual findings the ICTY's Prosecution had brought to light, asserting that '*it should in principle accept as highly persuasive relevant findings of fact made by the Tribunal*' (at [§223](#))

Even more significantly, the ICJ also relied upon a substantial part of the ICTY's legal findings. Among these counted the qualification of Bosnian Muslim men of Srebrenica as a '[substantial part](#)' of the targeted group, an immensely important puzzle piece within the [evidentiary basis](#) for the crime of genocide. Various commentators therefore found the ICJ to have given due weight to the findings reached by the ICTY that laid [within its expertise](#), namely international criminal law. It only refused to accept its authority were it felt the Tribunal had [stepped outside its jurisdiction](#), i.e. in the case of the famous '[overall control test](#)' surrounding state responsibility.

### **The actual fragmentation at stake**

The lessons to take from these findings are several. Firstly, we are reminded of the reasons for which the debate on fragmentation eventually faded away in the first place: while instances of fragmentation undisputedly exist, international courts [more often than not](#) decide in a coherent manner. Oftentimes fragmentation is a [narrative](#) that sparks more concerns than it deserves; reason for which more recent literature has called to '[bury the f-word](#)'. International courts have learned to mutually recognize each other's authority while even increasingly engaging in cross-fertilization and -referencing; skills that will come in handy in the Myanmar matter.

Secondly, ICJ and ICC will nonetheless be required to pay due attention to each other regarding the Rohingya proceedings. Especially the ICC might be well-advised to incorporate some of the prudence the ICJ is known for into its practice. Importantly, all this holds true not merely for the hypothetical case this blogpost focused on, namely that genocide would actually be charged before the ICC. Both courts might equally profit from one another's factual findings even if charges are not directly complementing each other.

Thirdly, the actual fragmentation at stake could be of a different nature than assumed. For once, one cannot shake the feeling that the real disintegration to be feared in the Rohingya context is less inter-tribunal than intra-tribunal fragmentation – and that it has already happened. This assumption speaks to contradictions not with other courts' rulings, but with one's own case law and statutory regulations. The PTC's rulings in the present case, after all, arguably disregarded much of the ICC's former case law, as discussed extensively by [Bachmutsky](#) or [Wheeler \(p. 624\)](#).

A second and last type of fragmentation we should be concerned with regarding the present case has even less in common with the meaning scholarship commonly assigns to the term. Even if the ICC should still assume jurisdiction over the '*slow genocide*' of the Rohingya, this would not only continue to deepen the above-described intra-tribunal fragmentation. Its troublesome legal trickery would moreover

not change the fact that the variety of crimes committed against the Rohingya could never be comprehensively treated before the ICC. Accountability will remain fragmented; the absence of a ratification of the Rome Statute being the actual reason for Myanmar officials escaping justice.

*Rachel Behring holds a Bachelor of Arts in International Relations from Technical University of Dresden. She is currently completing an internship in the Office of the Prosecutor of the International Residual Mechanism for Criminal Tribunals.*

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